BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NICHO HOLGUIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,498
DUKE DRILLING COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
WESTPORT INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 11, 2007 preliminary hearing Order For Compensation of Administrative Law Judge Pamela J. Fuller. Claimant was awarded temporary total disability compensation and ongoing medical care after the Administrative Law Judge (ALJ) impliedly found that claimant suffered an accidental injury arising out of and in the course of his employment.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, a back-up hand for respondent, was injured in an automobile accident on March 30, 2006, while returning home from a drilling site. Claimant had left his home in Lewis, Kansas, at approximately 6:00 a.m. the day before the accident, picked up a co-worker in Kinsley, Kansas, and driven to Ness City, Kansas, where he and the

co-worker met a driller. The driller then drove claimant and the co-worker to the rig site. Claimant worked until about 2:30 p.m., when he returned home for a brief rest, and to eat. Claimant then returned to the rig site and worked until early the next morning, the date of accident. The accident occurred at approximately 8:00 a.m. on the morning of March 30, when claimant was driving the co-worker to the co-worker's house in Kinsley. The co-worker suffered minor injuries. Claimant's injuries were much more serious, requiring a lengthy hospital stay, surgery and extensive post-surgery medical care and physical therapy.

Respondent argues that claimant's injuries were not compensable as claimant was on his way home, and the "going and coming"[1] rule applies to this circumstance. Respondent acknowledges that claimant was driving a co-worker home from the drilling site, but failed to mention that this was the responsibility of claimant to drive this co-worker to and from work. It is also significant that claimant was on call 24 hours per day, was paid his hourly wage from the time he left his house, and was paid mileage for the trip from his house to the rig or to the location in Ness City.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident

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[1] K.S.A. 2005 Supp. 44-508(f).

[2] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2005 Supp. 44-501(a).

> occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

K.S.A. 2005 Supp. 44-508(f) limits injuries arising out of and in the course of employment to not include,

> . . . injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.[6]

K.S.A. 2005 Supp. 44-508(f) bars an employee injured on the way to or from work from workers compensation coverage.

> The rationale for the "going and coming" rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[7]

A situation strikingly similar to this case is discussed in *Messenger.*[8] In *Messenger*, the claimant was killed while traveling home from a distant drill site. The Kansas Court of Appeals noted in *Messenger* that:

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[9]

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] K.S.A. 2005 Supp. 44-508(f).

[7] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[8] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[9] *Id.* at 437.

Larson's[10] also recognizes the "inherent travel" exception to the going and coming rule.

> Several so-called "exceptions" to the basic premises rule on going and coming are applications of this principle: employees sent on special errands; employees continuously on call; and employees who are paid for their time while traveling or for their transportation expenses. The explanation of these exceptions, and the clue to their proper limits, is found in the principle that the journey is an inherent part of the service.[11]

This Board Member finds that claimant's operation of a motor vehicle on public roads was an integral part of his employment. Plus, claimant was being paid while traveling, was provided transportation expenses by respondent and was providing respondent with the added benefit of delivering another worker to the transportation site. This Board Member finds that claimant was injured in an accident arising out of and in the course of his employment with respondent. Therefore, the Order of the ALJ should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Pamela J. Fuller dated January 11, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[10] 1 *Larson's Workers' Compensation Law*, § 14.04 (2006).

[11] *Id.*

[12] K.S.A. 44-534a.

Dated this ____ day of March, 2007.

BOARD MEMBER

c: Mel L. Gregory, Attorney for Claimant
Matthew L. Schaefer, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge